UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OFFICE OF PROFESSIONAL RESPONSIBILITY
WASHINGTON, DC

DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY,
Complainant,

v. Complaint No. 2006-25

PHILIP G. PANITZ,
Respondent.

Timothy Heinlein and Richard Ahnstruther, Attys.,
IRS, Office of Chief Counsel General Legal Services
Los Angeles, CA, for the Complainant.
Joseph Mudd, Atty., Irvine, CA, for the Respondent.

DECISION

Lana H. Parke, Administrative Law Judge. This matter arises from a complaint issued June 30, 2006, by the Acting Director, Office of Professional Responsibility, Department of the Treasury, Internal Revenue Service (OPR or Complainant), pursuant to 31 C.F.R. 10.60 and 10.82, issued under the authority of 31 U.S.C. 330, seeking to have Respondent, Philip G. Panitz (Mr. Panitz or Respondent), an attorney engaged in practice before the Internal Revenue Service (IRS), suspended from such practice for a period of one year for having engaged in disreputable conduct in violation of the provisions of 31 C.F.R. Part 10 (Treasury Department's written regulations governing the practice of attorneys and other professionals before the IRS), commonly known, and referred to herein, as Circular 230.[1]

On February 17 and 18, 2009, a hearing was held in City 1, State 1 at which the parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument.[2] Proposed findings of fact, conclusions of law, and supporting reasons submitted by the parties after the hearing have been given due consideration. Upon the entire record, and from my observation of the demeanor of the witnesses, I make the following

[1] Circular 230 having undergone four revisions in the last decade, citations in documentary evidence herein to sections of those regulations may not parallel current subpart citations. The regulation Respondent is charged with violating is currently identified as Section 10.51(a)(4) of Circular 230 (revised in 2008), which is essentially unchanged from like provisions of Circular 230 in effect at times relevant to this matter: "(4) Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing the information to be false or misleading. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, and any other document or statement, written or oral, are included in the term "information."

[2] At the hearing, Respondent tendered an offer of proof as to the testimony of Expert A, proffered by Respondent as an expert witness in professional ethics, which offer of proof was rejected.

Findings of Fact

A. Background

Respondent, Mr. Panitz, is licensed in State 1 as an attorney and has engaged in the practice of tax law since 1989. At all times relevant hereto, Mr. Panitz has engaged in practice before the IRS within the purview of 31 C.F.R. 10.2(d) and 10.3(a). As such, Mr. Panitz is bound by the rules and regulations contained in Circular 230. During the relevant period, Attorney 1 was Mr. Panitz' junior law partner.[3]

At all relevant times, the IRS has administered an Offer and Compromise Program which makes available to taxpayers who are financially unable to meet tax liability an opportunity to compromise and resolve the debt at an amount less than the assessed tax. To avail oneself of the Program, a taxpayer must file a Form 656 to one of two program centers: Memphis or New York. Form 656 is an "Offer in Compromise" document that requires detailed information, including, in pertinent part, the following sections (designated "Items"): (1) Item 6 in which the taxpayer selects one of three reasons for the offer in compromise. The pertinent sub-choice of Item 6 is "Doubt as to Collectibility," in which the taxpayer claims insufficient assets and income to pay the full amount of assessed tax. Selection of this subsection requires the applicant to include a complete Collection Information Statement, as well as Form 433-A and/or Form 433-B. (2) Item 7 in which the taxpayer states the amount offered to pay the assessed tax liability. Item 7 refers the taxpayer to Item 10 to explain "where [the taxpayer] will obtain the funds to make this offer." (3) Item 10 provides space for the taxpayer to state the sources from which the taxpayer "shall obtain the funds to make this offer." Form 433-A, at Section 7, requires the taxpayer to list all assets and liabilities, including those which may be unavailable to the IRS for collection purposes.

The disreputable conduct alleged herein involves tax services under the Offer and Compromise Program that Mr. Panitz' law firm provided to two taxpayer couples: (1) Taxpayer 1 and Taxpayer 2 and (2) Taxpayer 3 and Taxpayer 4.

B. Taxpayers 1 and 2

On Date 1, Taxpayers 1 and 2 transferred $ Amount 1 to Respondent, $ Amount 2 of which was deposited into Respondent's general account and the remaining $ Amount 3 of which was deposited into Respondent's attorney-client trust fund.[4] By letter dated Date 2, Attorney 1, on behalf of Taxpayers 1 and 2, submitted to the IRS a formal Offer in Compromise proposal, attaching IRS Forms 656 (with accompanying statement)

[3] Although Mr. Panitz acknowledged that, as senior partner, he had responsibility for documents issued by his office, he denied that he or anyone else in his office reviewed Attorney 1's work. Claimant's counsel argues that Mr. Panitz' testimony in this regard conflicts with his admission to Complaint paragraph II.C--"During times relevant to this complaint, Respondent supervised Attorney 1"--and evidences his lack of credibility. I do not find Mr. Panitz' testimony to be incredible in this or any other instance. Rather, I found Mr. Panitz testified forthrightly and candidly within recollection limits consequent to a Years A to Years B lapse between events and testimony. In the instant Complaint/Answer context, I take the unqualified term "supervised" to be descriptive of general oversight without other legal or factual significance.

[4] Bank records showed Taxpayers 1 and 2 wrote a check to Mr. Panitz that was paid from their Bank A account on Date 3 in the amount of $ Amount 1, $ Amount 3 of which was deposited into a law firm trust account.

and 433-A. Each of the forms bore the signatures of Taxpayers 1 and 2 under declarations of truthfulness and completeness subject to penalties of perjury.[5]

In Form 656, Item 6, Taxpayers 1 and 2 checked the box indicating "Doubt as to Collectibility," as the reason for the offer in compromise. At Item 7 Taxpayers 1 and 2 offered $ Amount 4 in compromise. Taxpayers 1 and 2 did not provide the required explanation of where they would obtain the funds to make the offer, leaving Item 10 blank. Although Taxpayers 1 and 2 attached Form 433-A to Form 656, they did not, in Section 7 of Form 433-A, list as an asset any money paid into Mr. Panitz' trust fund. Taxpayers 1 and 2 attached an "Offer in Compromise Statement" to Form 656, which read, in pertinent part:

> [Taxpayers 1 and 2] are the victims of bad advice and a failure to understand the implications of withdrawing large amounts of money from an Individual Retirement Account ("IRA"). Government regulations forced Taxpayer 1 to retire from his career as a pilot for Airline 1 when he turned Age A. Having been a pilot for Years C, Taxpayer 1, who is now Age B, is not trained from any other employment.
> …
> [When Taxpayer 1 retired from Airline 1 in Date 4], Taxpayers 1 and 2 withdrew $ Amount 5 from [an Airline 1-established] IRA to secure financing for construction on their City 2 residence. This withdrawal resulted in a large tax liability Taxpayers 1 and 2 did not anticipate. As the value of the security and IRA decreased due to the falling stock market after Date 5, Taxpayers 1 and 2 were forced to make additional withdrawals to meet the security requirements, thereby incurring additional income tax liabilities. A vicious circle was created whereby withdrawing money for living expenses and taxes generated additional taxes, quickly depleting the IRA accounts.
>
> Realizing their IRA accounts would soon be wiped out, Taxpayers 1 and 2 purchased an annuity that will provide them with income for the rest of their lives. The annuity will pay them approximately $ Amount 6 per month. This is all the retirement income Taxpayers 1 and 2 will receive from their IRA accounts for the rest of their lives, and they are in the process of reshaping their financial situation to budget accordingly.
>
> In this regard, Taxpayers 1 and 2 have been trying to sell their assets, including their boat and City 2 home. If purchasers can not be found in the immediate future, Taxpayers 1 and 2 are resigned to the fact that these assets will go into foreclosure.[6]
>
> All that remains of Taxpayers 1 and 2's assets are a relatively small annuity payment and the funds necessary to make this offer. Accordingly, an offer in compromise is in the best interests of the government and Taxpayers 1 and 2.[7]

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[5] Complainant asks the court to infer that Mr. Panitz actively participated in preparing the Offer in Compromise submissions herein. There is no basis for drawing such an inference.

[6] By the time the IRS reviewed Taxpayers 1 and 2's offer, the boat had been disposed of and the City 2 residence was in foreclosure.

[7] Carolyn Hinchman Gray (Ms. Gray), Acting Director of OPR, described Taxpayers 1 and 2's Offer in Compromise as "not forthcoming" about money it was later learned Taxpayers 1 and 2

In Date 6, the IRS assigned Taxpayers 1 and 2's Offer in Compromise to Officer A, revenue officer/offer and compromise specialist. Because, inter alia, Attorney 1 did not state the dollar amounts for the monies that Attorney 1 had described in the Taxpayer 1 and 2 Offer in Compromise Statement as "a relatively small annuity payment and the funds necessary to make this offer," Officer A took steps to "flesh out" the information.[8] By letter dated Date 7, Officer A requested 21 categories of additional information from Taxpayers 1 and 2, including items 15 and 16: "15. Copies of the last statement received from the state listing the amount of taxes owed, dates taxes assessed, and the current status. 16. Provide a copy of your retainer/fee agreement with your power of attorney establishing the terms of payment, an accounting of the payments made to date, and a statement of the current balance due."[9] Officer A also requested completion of enclosed "Personal History Questionnaires."

Responding on Date 8, to Officer A's Date 7 letter, Attorney 1 answered item 15 as follows: "Taxpayers 1 and 2 have requested this information, but believe the State is currently paid in full. However, Taxpayers 1 and 2 will be incurring another liability with the State when they file their return for Date 9 due to the IRA withdrawal of almost $ Amount 7 from their IRA in Date 10 to pay taxes for Date 11." Attorney 1 declined to answer item 16, stating, "Money paid to an attorney has been held [to be] information between an Attorney and Client, and since the money has been spent it is somewhat irrelevant anyway to an offer in compromise calculation." Attorney 1 included the Personal History Questionnaires that had been completed by Taxpayers 1 and 2, one question of which asked where the funds for the Offer in Compromise were coming from. In response to that question, Taxpayer 2 answered, "Funds are from IRA account; are now in escrow-type acct with our tax attorney;" Taxpayer 1 answered, in pertinent part, that information regarding the funds was "available at attorneys."

By letter dated Date 12, Officer A, in pertinent part, again requested information about funding for the Offer in Compromise:

> The information submitted indicated that the funds for this Offer are being held in trust by your attorney. I had previously requested information related to your agreement with your Power of Attorney establishing the terms of payment, an accounting of the payments made to date, and a statement of the current balance owed. This information is needed along with a complete disclosure of all funds that your Power of Attorney is holding on your behalf. (Please note: I have had previous discussions with our Counsel and have been advised that this information is not protected by attorney-client privilege.)

By letter dated Date 13, Attorney 1 responded to Officer A's letter by attaching documentation, including bank records, showing that on Date 1—the day before Taxpayers 1 and 2 submitted their Offer in Compromise proposal to the IRS—Taxpayers 1 and 2 had deposited $ Amount 3 into the law firm's trust fund and that the firm had

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had transferred to the Panitz firm and which had been placed in the firm's client trust fund. I take her testimony to mean that she did not believe the responses in the offer were open and/or frank.

[8] Many offers are submitted with statements of a general nature, which Officer A then has to pin down to dollars and cents; it is "pretty standard" for him to flesh out the offers.

[9] Officer A was unaware of any manual, regulation, or code provision that required disclosure of what a compromise-offering taxpayer paid his attorney through a trust account.

billed Taxpayers 1 and 2 $ Amount 8 for IRS-related work. Attorney 1 stated: "Taxpayers 1 and 2 are being billed on an hourly basis for work related to the offer…We are providing this information as a courtesy but still dispute the assertion that it is not privileged." Attorney 1 did not supply his law firm's fee/retainer agreement with Taxpayers 1 and 2. In Officer A's view, the additional information required reassessment of Taxpayer 1 and 2's Offer in Compromise inasmuch as they had revealed a potentially realizable asset of $ Amount 3.[10]

Attorney 1, who at the time of the hearing was no longer with the Panitz firm, did not testify. Mr. Panitz testified that of the $ Amount 3 Taxpayers 1 and 2 paid into his trust fund account on Date 1, $ Amount 4 was the amount intended to fund Taxpayer 1 and 2's Offer in Compromise. When submitting Offers in Compromise to the IRS, Mr. Panitz' practice is to get compromise-offer money from client-taxpayers in advance so the money will not be dissipated by the time the offer is "worked." In such cases, Mr. Panitz' practice is to notify the IRS by cover letter that he has deposited the offer monies into his trust account for the benefit of the IRS and that it will be transferred to the IRS if the agency accepts the offer. Although Mr. Panitz had informed Attorney 1 of the firm's practice in this regard, the cover letter to Taxpayer 1 and 2's Offer in Compromise, drafted by Attorney 1 and not reviewed by Mr. Panitz, failed to notify the IRS of offer monies held in Mr. Panitz' trust account.

Of the remaining $ Amount 9, as Mr. Panitz also testified, $ Amount 10 was a deposit toward attorney fees for five separate legal matters Taxpayers 1 and 2 had retained Mr. Panitz to handle, which amount Mr. Panitz thereafter transferred into his firm's general account.[11] The other $ Amount 10 was intended to pay taxes Taxpayers 1 and 2 owed the State 1 Tax Board, with which entity Attorney 1 was authorized to negotiate on Taxpayer 1 and 2's behalf. Mr. Panitz retained in the firm's client trust fund both the $ Amount 4 Offer-in-Compromise money and the $ Amount 10 earmarked for state tax liability.[12]

On Date 14, shortly after Attorney 1 provided Officer A with documentation regarding Taxpayer 1 and 2's money in the law firm's trust account, Officer A referred Mr. Panitz and Attorney 1 to OPR as apparent violators of Sections 10.20(a) and 10.51(b) of Circular 230, based on his belief that "one or both of [Mr. Panitz and Attorney 1] acting as the Power of Attorneys for Taxpayers 1 and 2 have failed to provide complete financial disclosure of the taxpayer's assets and have been parties to supplying false and/or misleading information…[and] have failed to provide additional information related to the terms of their fee agreement, charges to the taxpayer, and payments made by the taxpayers, that was requested several times." Specifically, Officer A faulted Attorney 1's refusal to provide the relevant fee/retainer agreement and

[10] According to Officer A, treatment of the trust fund monies as an asset would have raised the facially appropriate Offer in Compromise amount to $ Amount 11 rather than the $ Amount 4 Taxpayers 1 and 2 had proposed.

[11] Mr. Panitz' practice was to obtain the entirety of anticipated fees before commencing work for a client. Mr. Panitz characterized the fees as "earned upon receipt" but for which he had to perform the agreed-upon work.

[12] At some point, Attorney 1 reached agreement with the Tax Board for an unspecified amount in satisfaction of Taxpayer 1 and 2's state tax liability and paid the agreed-upon amount to the state. Eventually, the entire $ Amount 1 Taxpayers 1 and 2 initially gave the Panitz firm was paid, in unspecified shares, to the Panitz firm for legal services and to the Tax Board.

his omission of the $ Amount 3 trust account from documentation supporting Taxpayer 1 and 2's Date 2 Offer in Compromise.[13]

IRS proceedings on the Taxpayer 1 and 2's Offer in Compromise continued. By letter dated Date 15, the IRS rejected Taxpayers 1 and 2's Offer in Compromise. Taxpayer 1 and 2 appealed the rejection. Analyzing Taxpayer 1 and 2's assets during the course of the appeal, the IRS Settlement Officer, Officer B, limited the value of the money in the attorney's escrow account to $ Amount 4, stating:

> These funds are in an "escrow type account" with the taxpayers' tax attorney. The…investigation revealed the funds are in the amount of $ Amount 3…I allowed the…retainer because the representative explained to me that the balance represents their fees for finishing the Offer negotiations as well as monitoring the payments to be made by the taxpayer upon acceptance of the Offer. Thus, I conclude this asset to be worth $ Amount 4.[14]

C. Taxpayers 3 and 4

On Date 17, Taxpayers 3 and 4 met with Mr. Panitz for an initial consultation regarding a possible IRS Offer in Compromise to resolve the couple's federal tax liabilities. Although Mr. Panitz had no specific recollection of the meeting, his normal course in such consultations was to discuss various approaches for resolving the liability. In the course of the discussion, Mr. Panitz told Taxpayer 3 that funds distributed from a Workers Compensation settlement were subject to IRS levy in tax collection. Mr. Panitz did not recall whether Taxpayer 3 informed Mr. Panitz that he had received a lump sum Workers Compensation settlement; Mr. Panitz made no such notation to his notes of the conversation. After his consultation with Taxpayers 3 and 4, Mr. Panitz made a file note that his secretary should follow up with the couple to see if they wished to retain Mr. Panitz from which Mr. Panitz inferred that Taxpayers 3 and 4 did not retain him at that time.

Shortly after their initial consultation with Mr. Panitz, Taxpayers 3 and 4 retained the Panitz firm, and at some point between Date 18 and Date 19, Taxpayers 3 and 4 wire-transferred $ Amount 12 from their Bank B bank account to the trust account of the Panitz law firm.[15] Thereafter a Panitz firm paralegal assembled Taxpayer 3 and 4's

[13] The Complainant does not, in these proceedings, allege any violation in the Panitz firm's refusal to provide the IRS with its retainer/fee agreement with Taxpayers 1 and 2.

[14] The IRS ultimately determined that Mr. Panitz' deposit of fees into his trust account was reasonable. According to Ms. Gray, Acting Director of OPR, the appropriateness of attorney fees did not alter OPR's position that the original submission should have reflected that amount.

[15] The documentary evidence of record does not clearly reflect such a transfer. The bank records in evidence show Taxpayers 3 and 4's Bank B account balance of Date 20 was $ Amount 13 and that between that date and Date 19, $ Amount 14 was withdrawn from the account. However, communications between Officer A and Mr. Panitz during Date 21 acknowledge the transactions: in Officer A's Date 22, referral of Mr. Panitz and Attorney 1 to OPR, Officer A asserted that bank records showed the existence of $ Amount 15 in Taxpayer 3 and 4's account from which, on Date 19, $ Amount 16 and $ Amount 12 were wire-transferred, respectively, to Taxpayer 3's mother and Mr. Panitz; by letter dated Date 23, Mr. Panitz pointed out to Officer A that on Date 24, he had provided "copies of all the client's bank statements [Officer A had] requested, which include information regarding the transfer of funds to the client trust account (see Exhibit 1 to our Date 24 letter);" and the Respondent admitted the Complaint allegation that "On or about Date 19, Taxpayers 3 and 4 transferred [$ Amount 12] to Respondent's client trust fund account." I find it

Offer in Compromise paperwork, including IRS Forms 656 and 433-A completed by Taxpayers 3 and 4. The paralegal turned the paperwork over to Attorney 1 for review. By letter dated Date 25, Attorney 1, on behalf of Taxpayers 3 and 4, submitted to the IRS a formal Offer in Compromise proposal, attaching IRS Forms 656 and 433-A. Each form bore the signatures of both Taxpayers 3 and 4 under declarations of truthfulness and completeness subject to penalties of perjury. Mr. Panitz did not review Taxpayers 3 and 4's offer before its submission to the IRS.

On Form 656, Item 6, the box indicating "Doubt as to Collectibility" was checked and at Item 7, $ Amount 19 was offered in compromise. Taxpayers 3 and 4 did not provide the required explanation of where they would obtain the funds to make the offer, leaving Item 10 blank. Item 9, Explanation of Circumstances, reads, in pertinent part:

> In Date 26, Taxpayer 3 was in a severe work-related accident and can no longer work due to the injuries he sustained. He is living off $ Amount 17 a month from his workers compensation settlement. He lives exclusively off the workers compensation settlement. As a result of his medical condition, Taxpayer 3 does not have sufficient income or assets to pay his outstanding income tax liabilities.

On Form 433-A submitted with Taxpayer 3 and 4's Offer in Compromise, non-employment of both Taxpayer 3 and 4 was noted at Section 3. At Section 4, receipt of income from "W. Comp" was noted, but the required attachments of "proof of [Workers Compensation] income for the past Months B" were omitted. Section 7 failed to list as an asset any money paid into Mr. Panitz' trust fund. At Section 9, total income was stated as coming from Workers' Compensation in the amount of $ Amount 17 monthly.

By letter dated Date 27, Attorney 1 responded to IRS inquiries about Taxpayer 3 and 4's Offer in Compromise, stating, in pertinent part, that "Taxpayer 3 receives $ Amount 17 per month from his mother to pay living expenses" and asserting that "there are no changes to the last financial statement [submitted Date 25 with the Offer in Compromise]." Attorney 1 attached copies of four cancelled checks for the months of Date 28 through Date 29 showing monthly payments to the Taxpayers 3 and 4 of $ Amount 17 from Taxpayer 3's mother, each noted as a loan to Taxpayer 3.

On May 15, 2003, IRS Agent 1 who was reviewing Taxpayer 3 and 4's offer telephoned Attorney 1 and questioned the manner in which Taxpayer 3 received Workers' Compensation. In obtaining response information, Mr. Panitz and Attorney 1 discovered that Taxpayer 3 had obtained a lump sum settlement from Workers Compensation and that he had transferred the settlement money to his mother's account from which she dispensed to Taxpayer 3 a monthly amount. Realizing Taxpayer 3 had not been truthful with his attorneys or on the 433-A form, Mr. Panitz and Attorney 1 told Taxpayer 3 they would have to report their findings to the IRS.

On Date 30, Mr. Panitz and Attorney 1 held a conference call with Agent 1 and, according to her notes, informed her that Taxpayer 3's mother doled out his Workers Compensation settlement money (of an unstated amount) at $ Amount 17 per month.

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reasonable, therefore, to infer that on Date 24, Mr. Panitz provided documentation to Officer A that Taxpayers 3 and 4 had wire-transferred $ Amount 12 from their Bank B account to his firm's trust account. By similar inference, I find that during the same time period Taxpayers 3 and 4 wire-transferred $ Amount 16 from their bank account to the account of Taxpayer 3's mother.

Mr. Panitz asked that he be permitted until Date 31 to provide all information regarding the money to the IRS.

Thereafter, Taxpayer 3 and 4's Offer in Compromise was assigned to Officer A who, by letter dated Date 32, requested additional documentation from Taxpayers 3 and 4. Question 4 in Officer A's request asked for "an updated financial statement to reflect any changes since [the] last statement provided, dated Date 33."

Mr. Panitz responded to Officer A's request on Date 24, stating, "With respect to request no. 4, please be advised that there are no changes to the last financial statement." In the same response, Mr. Panitz provided documentation, in pertinent part, of the following circumstances: (1) the State 1 Workers Compensation Board having rated Taxpayer 3's disability at Percentage 1, the Workers' Compensation Appeals Board, on Date 34, approved a Compromise and Release of Taxpayer 3's workers' compensation claim for a total net payment in excess of $ Amount 18 to Taxpayer 3; (2) between Dates 18 and 19, Taxpayers 3 and 4 wire-transferred $ Amount 16 from their Bank B bank account to the account of Taxpayer 3's mother, as trustee for Taxpayers 3 and 4 at Bank C, (Taxpayer 3's mother's account); (3) between Dates 18 and 19, Taxpayers 3 and 4 wire-transferred $ Amount 12 from their Bank B account to the bank account of the law firm of Mr. Panitz; [16] (4) beginning Date 35, monthly checks drawn on Taxpayer 3's mother's account were paid to Taxpayer 3 or 4, with the occasional memo description of "loan for son"; (5) Personal History Questionnaires completed by Taxpayers 3 and 4, each dated Date 36, stated that funding for the Offer in Compromise was in an attorney-client trust account.[17]

On Date 22, Officer A referred Mr. Panitz and Attorney 1 to OPR as ostensible violators of Section 10.51(b) of Circular 230, based on his belief that "one of both of [Mr. Panitz and Attorney 1] acting as the Power of Attorneys for the [Taxpayers 3 and 4] have failed to provide complete financial disclosure of the taxpayer's assets and have been parties to supplying false and/or misleading information." Specifically, Officer A asserted that bank records not disclosed at the time Taxpayers 3 and 4 made the Offer in Compromise, showed the existence of $ Amount 15 in Taxpayer 3 and 4's account from which, on Date 19, $ Amount 16 and $ Amount 12 were wire-transferred, respectively, to Taxpayer 3's mother and Mr. Panitz. Officer A stated he "suspected that all or most of the $ Amount 12 is still sitting in Mr. Panitz' attorney client trust account," further asserting that Taxpayers 3 and 4's attorneys were fully knowledgeable of the existence of taxpayer assets but failed to disclose them on the original Form 433-AA.

Mr. Panitz testified at the hearing that of the $ Amount 12 Taxpayers 3 and 4 transferred into his firm's trust account, $ Amount 19 was to fund the compromise offer and $ Amount 20 was a deposit toward attorney's fees. Ultimately, all of the $ Amount 20 was used to satisfy attorney fees, and, after the IRS rejected the compromise offer, the $ Amount 19 was returned to the Housnicks.

By letter dated Date 37, Officer A notified Taxpayers 3 and 4 that the money in Taxpayer 3's mother's Bank C account had to be considered an asset for purposes of the Offer in Compromise and that their compromise offer of $ Amount 19 was substantially less than their net equity in assets. Officer A asked Taxpayers 3 and 4 to

[16] See footnote 15 for discussion of the evidence establishing the money transfers and Mr. Panitz' Date 24 documentation of them.
[17] Officer A considered that Mr. Panitz had provided all available information relating to Taxpayer 3's workers compensation claim.

provide an updated financial statement, Form 433-AA, disclosing all assets and to amend the amount offered in compromise to $ Amount 21, the amount remaining in Taxpayer 3's mother's account. Officer A also requested additional documentation, including a copy of Taxpayer 3 and 4's fee agreement with their attorney along with details of attorney payments and attorney/client trust fund accounting. By letter dated Date 38, Mr. Panitz objected to Officer A's requested amendment, pointing out that the money in Taxpayer 3's mother's account constituted Taxpayer 3 and 4's only source of income and requested that Officer A reject the Offer in Compromise so Taxpayer 3 and 4 could exercise their appeal rights.

Officer A did not reject Taxpayer 3 and 4's Offer in Compromise as Mr. Panitz requested. By letter dated Date 39, stating he could not consider Mr. Panitz' request, as "all necessary financial information must be provided," Officer A repeated his previous request for information. In his response dated Date 23, Mr. Panitz declined to provide copies of his fee agreement with Taxpayers 3 and 4 or a statement regarding the funds in their client trust account due to attorney-client privilege. With regard to preparing a new form 433-AA, Mr. Panitz stated:

> [T]he previous financial statement submitted by Taxpayers 3 and 4 did disclose their Worker's Compensation in section 4 of the form. If we prepare a new form, we will disclose the worker's compensation in exactly the same manner because it was paid as compensation for Taxpayer 3's lost income. To put the settlement anywhere else on the Form 433-AA would not accurately reflect what the settlement actually is, payment for lost income and medical expenses.
>
> …We originally discussed the worker's compensation settlement with the IRS representative in City 3, prior to the case being transferred to you. We know you were apprized of this fact because your first letter to our office dated Date 32, requested a lot of very specific information that related to the terms of the settlement which we had disclosed to City 3. In response, we provided all of the documentation you requested, including Taxpayer 3's disability rating, the settlement amount, and bank statements showing the transfer of the settlement proceeds from Taxpayer 3's Bank B account to a Bank C account in the name of Taxpayer 3's mother.
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> …From a financial perspective, everything has been disclosed. The fundamental difference of opinion in this case is whether a worker's compensation settlement that was intended as reimbursement for lost wages, and is being used as such, must all be used as part of an offer in compromise when the recipient is found to be Percentage 1 disabled and has no other income. We respect your right to disagree with our position in this matter and to reject the offer. Accordingly, we request you reject the offer pursuant to your letter of Date 37.

Thereafter, Officer A issued a summons to Mr. Panitz requiring him to appear before Officer A on Date 40 and to produce a copy of the law firm's engagement and fee agreements, along with documentation of all client trust account activity, related to Taxpayers 3 and 4. In his response of Date 41, Mr. Panitz declined to provide the fee agreement and/or billing statements for Taxpayers 3 and 4 on grounds they describe services provided and are protected by the attorney-client privilege. Mr. Panitz enclosed a Bank B bank statement that he noted had been provided to the IRS as Exhibit 1 in the firm's Date 24 letter and advised that as of that date, Taxpayers 3 and 4 had paid the firm fees and costs totaling $ Amount 22 from the funds deposited in the trust account.

On Date 42, Officer A recommended to the IRS that Taxpayer 3 and 4's Offer in Compromise be rejected because Taxpayers 3 and 4 had failed to offer an amount that reasonably reflected the amount that could be collected. Specifically, Officer A cited Taxpayer 3 and 4's failure to include in the offer a description of funds transferred to the attorney-client trust account and funds transferred to Taxpayer 3's mother's account. On Date 43, the IRS rejected Taxpayer 3 and 4's Offer in Compromise on grounds that the amount offered was less than the reasonable collection potential and indicated an offer of $ Amount 23 would be acceptable. Taxpayers 3 and 4 appealed the IRS' rejection, stressing equitable considerations of Taxpayer 3's physical disability and limited earnings capacity and pointing out that had Worker's Compensation annuitized the disability payment to Taxpayer 3 rather than granting him a lump sum settlement, the disability settlement would not have been included in IRS' realizable income computations. On Date 44, the IRS denied Taxpayer 3 and 4's appeal and rejected their Offer in Compromise, stating, "[T]he tax is held to be legally due and an amount larger than the offer appears to be collectible."[18]

Analysis and Conclusions

A. Legal Principles

Section 10.52(a) of 31 CFR provides that a practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service for "willfully violating any of the provisions contained in [Circular 230]." Section 10.51 provides that those sanctions may be imposed on a practitioner who engages in disreputable conduct, including the following:

> Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing the information to be false or misleading. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, and any other document or statement, written or oral, are included in the term "information.

Section 10.76 of Circular 230 sets the standard of proof for the level of sanction sought herein:

> If the sanction is…a suspension of six months or longer duration, an allegation of fact that is necessary for a finding against the practitioner must be proven by clear and convincing evidence in the record.[19]

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[18] The IRS ultimately categorized Taxpayer 3 and 4's case as uncollectible but reviewable.

[19] The Supreme Court has defined the "clear and convincing" standard as evidence that "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990). Another definition of "clear and convincing evidence" is evidence that creates an abiding conviction that the truth of [the plaintiff's] factual contentions are "highly probable." See McCormick, *Law of Evidence* § 320,

The complaint herein alleges that Mr. Panitz violated Circular 230 by engaging in the disreputable conduct of giving or participating in the giving of false or misleading information to an employee of the Department of Treasury when he failed properly to disclose his clients' assets in making Offers in Compromise on their behalf, knowing the information that was provided was false or misleading. As remedy for the alleged violations, OPR seeks the suspension of Respondent from practice before the IRS for one year. Inasmuch as OPR seeks a suspension of longer than six months, OPR must prove the charges by clear and convincing evidence.

While the term "willful" is not defined in Circular 230, its use in the Treasury laws has consistently been held to mean, in both criminal and civil contexts, the "voluntary, intentional violation of a known legal duty." E.g., *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *Thibodeau v. United States*, 828 F.2d 1499, 1505 (11th Cir. 1987). Willful "requires more than a showing of careless disregard for the truth." *United States v. Pomponio* at 12, noting the Court's holding in *United States v. Bishop*, 412 U.S. 346, 359-360 (1973).[20] The Director does not, however, have to show that Respondent acted with malicious intent or bad purpose, only that he voluntarily, and intentionally disregarded or was indifferent to his obligations.

B. Alleged False Information Provided to the IRS in Taxpayer 1 and 2's Offer in Compromise

Complainant contends that Respondent engaged in disreputable conduct by knowingly giving false or misleading information to the IRS in connection with Taxpayer 1 and 2's Offer in Compromise. Specifically, Complainant charges Respondent with failing to disclose to the IRS the sum of $ Amount 3 that Taxpayers 1 and 2 transferred into Mr. Panitz' attorney-client trust fund on Date 1. The $ Amount 3 was the aggregate sum intended to satisfy three separate obligations: (1) $ Amount 4 to pay the Compromise in Offer proffered to the IRS on behalf of Taxpayers 1 and 2; (2) $ Amount 10 to resolve Taxpayer 1 and 2's state tax liability; (3) $ Amount 2 to cover Taxpayer 1 and 2's anticipated attorney's fees and costs. Complainant argues that each of the three sums should have been disclosed.

1. The $ Amount 4 in Mr. Panitz' Client Trust Account Designated to Fund Taxpayer 1 and 2's Offer in Compromise

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at 679 (1954)); *Lisenbee v. Henry*, 166 F.3d 997, 1000 (9th Cir.), *cert. denied*, 120 S. Ct. 82 (1999).

[20] OPR argues that the *Pomponio* standard, arising as it did from a criminal provision in the IRS Code, is higher than that required under Circular 230. Complainant analogizes OPR proceedings to other professional disciplinary actions such as state bar proceedings, which in State 1 have held that "willful" requires a showing only of "a general purpose or willingness to commit the act or permit the omission." See *Edwards v. State Bar,* 52 Cal. 3d 28, 37 (1990); *Durbin v. State Bar,* 23 Cal. 3d 461, 467 (1979). As did the *Pomponio* Court, the State 1 State Bar looked to a relevant penal code in forming its definition. See *Durbin v. State Bar* 23 Cal.3d 461, 467 (1979); (Pen. Code, § 7, subd. 1.) The State 1 State Bar standard, like that of *Pomponio*, requires intentional conduct.

Regarding the $ Amount 4 retained in Mr. Panitz' client trust account to pay Taxpayer 1 and 2's Offer in Compromise, Mr. Panitz acknowledged at the hearing that the firm was obligated to notify the IRS about the money. When Attorney 1 filed Taxpayer 1 and 2's offer, he failed to follow the firm's practice of notifying the IRS by cover letter that the offer monies had been deposited into a trust account for the benefit of the IRS. Attorney 1 further failed to include any specific information in Taxpayer 1 and 2's Offer in Compromise forms about the whereabouts or source of the offer-funding monies. However, in a statement attached to the forms, Attorney 1 noted that "the funds necessary to make this offer" remained as an asset of Taxpayers 1 and 2.

In "flesh[ing] out" Taxpayer 1 and 2's Offer in Compromise—a not unusual follow-up procedure—Officer A asked where the funds for the Offer in Compromise were coming from. Attorney 1 provided Officer 1 with Personal History Questionnaire forms Taxpayers 1 and 2 had completed, wherein they reported that funds for the offer came from an IRA account and were then in an escrow account with Mr. Panitz' firm. In response to further inquiry, Attorney 1 provided Officer A with bank records showing that $ Amount 3 from Taxpayers 1 and 2 had been deposited into the firm's trust account on Date 3, of which $ Amount 4 were allocated for the Offer in Compromise.

The Complainant has shown that an offerer-in-compromise has an obligation to notify the IRS about monies held in his attorney's trust account. The Complainant has also shown that Attorney 1 did not, initially, clearly and specifically disclose to the IRS that $ Amount 4 of Taxpayer 1 and 2's money was held in the firm's trust account to fund the taxpayers' offer. It does not follow that Attorney 1's dereliction of duty in this regard brings Mr. Panitz within the prohibitions of Circular 230, §10.51 against "[g]iving false or misleading information…knowing the information to be false or misleading." First, the information Attorney 1 initially provided to the IRS on behalf of Taxpayers 1 and 2 in Forms 656 and 433-A, while deficient, was neither false nor misleading as regards the $ Amount 4. In the offer's filing documents, Attorney 1 noted that Taxpayers 1 and 2 offered $ Amount 4 to compromise their tax liability and that "the funds necessary to make this offer" remained as an asset of Taxpayers 1 and 2. By that statement, Attorney 1 alerted the IRS that the offer money existed as an asset of Taxpayers 1 and 2. Attorney 1's willing response to further IRS inquiry established the whereabouts of the $ Amount 4. While Attorney 1's filing documents may not have been entirely "forthcoming," as the Acting Director of OPR puts it, the evidence fails to show any attempt to falsify information regarding the $ Amount 4 or to mislead the IRS about its existence. Second, Complainant has failed to show that Mr. Panitz knew of, authorized, or otherwise bore responsibility for Attorney 1's filing deficiencies.[21] Accordingly, I find the facts herein do not show that Mr. Panitz falsely and/or misleadingly failed to disclose the $ Amount 4 in his attorney-client trust fund designated to fund Taxpayer 1 and 2's Offer-in-Compromise.

2. The $ Amount 10 designated to resolve Taxpayer 1 and 2's state tax liability

[21] In its post-hearing brief, Complainant asserts that Mr. Panitz "stated he supervised the final work completed by his secretary, and that he took responsibility for the work completed by Attorney 1 and his secretary." The portions of the transcript Complainant cites in support of that proposition show that Mr. Panitz, in the scope of his position as senior partner, exercised only general, not specific, oversight of documents Attorney 1 prepared.

Complainant contends that Mr. Panitz bears responsibility for his law partner's failure to disclose the $ Amount 10 reposing in the Panitz firm's trust account and earmarked for Taxpayer 1 and 2's future State 1 state tax payment. Complainant argues that as no state tax liability existed in Date 9 and as the $ Amount 10 had not been offered to the state tax board in Date 9, the $ Amount 10 was an asset available to Taxpayers 1 and 2 that should have been disclosed, and the firm's failure to do so was false and/or misleading.

At the time Attorney 1 filed the Taxpayer 1 and 2's Offer in Compromise on Date 2, Mr. Panitz' firm had obtained from the Taxpayers 1 and 2 and placed in its attorney/client trust fund the amount of $ Amount 10 designated to pay Taxpayer 1 and 2's State 1 state tax liability when that liability should be determined. It was anticipated that Attorney 1 would, at some time in the future, negotiate with the State 1 Tax Board to settle Taxpayer 1 and 2's state tax liability, which he did, and thereafter pay the state liability from the funds reserved for that purpose, which he also did.

Attorney 1 did not disclose the $ Amount 10 state tax reserve in Taxpayer 1 and 2's Offer in Compromise. As of Date 8 when Attorney 1 responded to Officer A's Date 7 letter, no state tax liability existed, although Taxpayers 1 and 2 anticipated a liability upon filing their Date 9 return consequent to their Date 10 IRA withdrawal of almost $ Amount 7. Mr. Panitz does not dispute that Taxpayers 1 and 2 could, at any time prior to the actual payment of the money to the State 1 Tax Board, have demanded return of the funds and agreed at the hearing that Attorney 1"probably should have" disclosed the existence of the $ Amount 10.

Mr. Panitz denies any intention of hiding the $ Amount 10 from the IRS or misleading the IRS regarding its existence, maintaining that the following facts are inconsistent with a voluntary or intentional violation of the provisions of Circular 230: (1) Taxpayers 1 and 2 directed the Panitz firm to set aside the money to pay anticipated state tax liability; (2) Attorney 1 readily and fully disclosed all money paid to the Panitz firm when he provided Officer A with pertinent bank records on Date 13; (3) no evidence was adduced to show that Mr. Panitz knew of, authorized, or participated in any way in Attorney 1's failure to list the $ Amount 10 as an asset. Mr. Panitz' arguments are persuasive.

Acceptance of Complainant's position with regard to the $ Amount 10 would require me to find that omission of material information in an Offer in Compromise is, *per se,* evidence of disreputable conduct within the meaning of Circular 230. Complainant provides no authority to support such a finding. Rather, the plain language of Circular 230 requires, at Section 10.52(a), a showing of a "[willful violation of] any of the provisions contained in [Circular 230]" to justify suspending a practitioner from practice before the IRS. Further, under Section 10.76, if a suspension of six months or longer is sought, Complainant must prove such a willful violation by clear and convincing evidence. Complainant has proved that Attorney 1 initially failed to disclose relevant information in Taxpayer 1 and 2's Offer in Compromise. However, the evidence further shows that Officer A often had to "flesh out" the information provided in taxpayers' Offers in Compromise, from which it is reasonable to infer that it is not uncommon for taxpayers to omit or fail to disclose pertinent information in their offers without, presumably, incurring the penalties described in Circular 230. It follows, and I find, that willfulness cannot be established by mere omission or failure to disclose information but must be evidenced by conduct from which an intent to deceive or mislead may be inferred. Thus, nondisclosure alone cannot prove a "knowing" submission of false or misleading information. When Officer A, on Date 12, requested "a complete disclosure of all funds"

the firm held on Taxpayer 1 and 2's behalf, Attorney 1, on Date 13, provided documentation of the entire $ Amount 3 Taxpayers 1 and 2 had deposited into the firm's trust account, which amount included the $ Amount 10 projected tax liability money. There is no evidence of resistance, equivocation, or distortion in Attorney 1's divulgence of information about Taxpayer 1 and 2's trust account deposit. The lack of any such evidence negates an intent to deceive or mislead.

Even assuming Attorney 1 knowingly submitted false or misleading information to the IRS in this regard, the Complaint does not name Attorney 1, who has left both the firm and the practice of law; it only names Mr. Panitz. In order to prove that Mr. Panitz willfully violated the provisions of Circular 230, Complainant must present clear and convincing evidence that Mr. Panitz knew of and participated in or approved Attorney 1's submissions. Complainant has not done so.[22] Evidence that Mr. Panitz assumed general responsibility for his firm's actions and for documents issued by the firm doesn't answer the evidentiary requirements of Circular 230. Accordingly, I find Complainant has not shown by clear and convincing evidence that Mr. Panitz falsely and/or misleadingly failed to disclose the $ Amount 10 in his attorney-client trust fund designated to resolve Taxpayer 1 and 2's state tax liability.

3. The $ Amount 2 Designated for Attorney Fees

Complainant contends that Attorney 1's failure to disclose Taxpayer 1 and 2's attorney-fee deposit of $ Amount 2 into the Panitz firm's trust account was false and/or misleading. Mr. Panitz maintains that the money deposited to pay attorney fees are no longer client assets but assets of the law firm. In support of its position, Complainant draws on language from the State Bar of State 1 Handbook on Client Trust Accounting to distinguish between advance fees (money paid upfront for the cost of legal representation) and retainers (money paid to ensure attorney availability to a client, which are earned in full at the time received). Arguing that the $ Amount 2 payment was an advance fee rather than a retainer and was thus subject to refund in circumstances where the legal work was not performed, Complainant insists Attorney 1 should have disclosed the fee's existence.

No evidence was adduced that the Panitz firm sought to conceal the existence of the $ Amount 2 as opposed to mere nondisclosure of it. It is reasonable to infer from Ms. Gray's testimony that the IRS did not quarrel with the appropriateness of the attorney fees charged to Taxpayers 1 and 2, taking the position only that the original submission should have disclosed the existence of the fees. As discussed above, nondisclosure alone cannot provide the clear and convincing evidence necessary to establish a willful violation of the provisions of Circular 230. Further, it appears the IRS has no clear-cut policy about the attorney-fee issue. Complainant points to no IRS manual, regulation, or code provision requiring disclosure of attorney fees in Offer in

[22] Complainant argues that even if Mr. Panitz did not participate in Taxpayer 1 and 2's initial submission, he thereafter adopted and/or did not correct the representations made by Attorney 1. Complainant also assails Mr. Panitz' credibility by pointing out inaccuracies and inconsistencies in Mr. Panitz' communications with OPR during that office's Date 16 inquiry into Mr. Panitz and Attorney 1's eligibility to practice before the IRS. After reviewing the communications, I conclude that any inaccuracies and inconsistencies reflect Mr. Panitz' cursory and perhaps even careless review of facts upon which he based his responses rather than a deliberate attempt to mislead OPR. Even if the inaccuracies and inconsistencies significantly impacted Mr. Panitz' general credibility, which I do not find, it does not follow that lack of credibility can substitute for factual proof of Mr. Panitz' knowledge and participation in giving false or misleading information to the IRS.

Compromise cases, and IRS Settlement Officer, Officer B, excluded the attorney-fee monies from Taxpayer 1 and 2's assets when limiting the value of the money in the escrow account to $ Amount 4. In circumstances where no clear IRS policy or guideline exists regarding whether attorney-fee payments are to be considered a taxpayer asset, Attorney 1's failure to specify $ Amount 2 designated for attorney's fees as an asset, cannot constitute the knowing communication of false or misleading information.

I find the facts herein do not prove that Mr. Panitz voluntarily or intentionally violated a known legal duty[23] or demonstrated a general purpose or willingness[24] to violate any provision of Circular 230 by his law firm's handling of Taxpayer 1 and 2's Offer in Compromise.

[23] *United States v. Pomponio* at 12.
[24] *Durbin v. State Bar*, at 467.

C. Alleged False Information Provided to the IRS in Taxpayer 3 & 4's Offer in Compromise

Complainant contends that Respondent engaged in false and/or misleading conduct (1) by failing to disclose to the IRS in Taxpayer 3 and 4's Offer in Compromise the sum of $ Amount 12 that Taxpayers 3 and 4 transferred into Mr. Panitz' attorney-client trust fund in Date 45 and (2) by failing to disclose Taxpayer 3's lump sum Workers Compensation settlement.

1. The $ Amount 12 in Mr. Panitz' Client Trust Account Designated to Fund Taxpayer 3and 4's Offer in Compromise and Pay Attorney Fees

Sometime between Date 18 and Date 19, Taxpayers 3 and 4 wire-transferred $ Amount 12 from their bank account to the trust account of the Panitz law firm. The $ Amount 12 was the aggregate sum intended to satisfy two obligations: (1) $ Amount 19 as the compromise offer to the IRS; (2) $ Amount 20 to cover Taxpayer 3 and 4's anticipated attorney's fees and costs. When Attorney 1 filed Taxpayer 3 and 4's offer on Date 25, he failed to include any information in the offer about the whereabouts or source of the $ Amount 19 offered to compromise Taxpayer 3 and 4's tax liability and also failed to inform the IRS that an additional $ Amount 20 was held in the firm's trust account to pay Taxpayer 3 and 4's attorney fees.

As stated earlier, Complainant has shown that an offerer-in-compromise is obliged to notify the IRS about monies held in a trust account. Complainant has shown that Attorney 1 did not initially disclose to the IRS that $ Amount 12 of Taxpayer 3 and 4's money was held in the firm's trust account to fund the taxpayers' offer and to pay attorney fees. Complainant has further shown that the Panitz firm did not remedy the omissions for a period of months A until, on Date 24, in response to Officer A's Date 32 request for additional information, Mr. Panitz provided documentation of Taxpayer 3 and 4's Date 46 transfer of $ Amount 12 from their bank account to the Panitz firm's trust account. The Complainant has not, however, shown that Mr. Panitz' delay in informing the IRS of Taxpayer 3 and 4's funds in the trust account constituted an attempt to falsify information regarding the money or to mislead the IRS about its existence.[25]

As discussed earlier, omission of material information in an Offer in Compromise is not, *per se,* evidence of disreputable conduct within the meaning of Circular 230. Rather, the Complainant must show by clear and convincing evidence a "[willful violation of] any of the provisions contained in [Circular 230]" to justify the one-year suspension it seeks. Here, the evidence shows that although Taxpayers 3 and 4's Date 47 Offer in Compromise omitted information about Taxpayer 3 & 4's money held in the Panitz firm's trust fund, Mr. Panitz provided the information within 15 days of Officer A's Date 32 request. Complainant has not shown deceit, evasiveness, or even recalcitrance on the part of Mr. Panitz in providing the post-offer information requested by Officer A. Once requested, the evidence shows Mr. Panitz readily provided the information. Accordingly, I find the facts herein do not show that Mr. Panitz falsely and/or misleadingly failed to disclose the $ Amount 12 in his attorney-

[25] Complainant also argues that by asserting in his Date 24 response that no changes were to be made to Taxpayer 3 and 4's 433-A form, Mr. Panitz submitted false and misleading information. While a meticulous response should probably have emended Taxpayer 3 and 4's 433-A form to conform to the documentary evidence provided at that time, it cannot reasonably be argued that Mr. Panitz' failure to do so was false and misleading inasmuch as Mr. Panitz contemporaneously provided the documented information from which the relevant facts could be ascertained.

client trust fund designated to fund Taxpayer 3 and 4's Offer-in-Compromise and/or pay their attorney fees.

2. Failure to Disclose Taxpayer 3's Lump Sum Workers Compensation Settlement

No party disputes that Taxpayer 3 and 4's Date 47 Offer in Compromise contained false and misleading information, as contemplated by the provisions of Circular 230. The misrepresentations were to the effect that Taxpayer 3 received periodic payments from Workers' Compensation in the amount of $ Amount 17 monthly, which money, under IRS policies, would not be a Taxpayer 3 and 4 asset. The true facts were that in Date 46, before the Taxpayers 3 and 4 met with Mr. Panitz and before their Offer in Compromise was submitted, Taxpayer 3 had obtained a lump sum settlement from Workers Compensation, which money the IRS would consider to be a Taxpyer 3 and 4 asset. The unsettled question is whether Mr. Panitz knew the information to be false and misleading when his firm submitted Taxpayer 3 and 4's Offer in Compromise to the IRS.

Complainant has presented no direct evidence that Mr. Panitz knew the Workers Compensation information contained in Taxpayer 3 and 4's Offer in Compromise was false at the time the Panitz firm submitted the offer. Rather, Complainant asks that such an inference be drawn from the following facts: (1) when Taxpayers 3 and 4 met with Mr. Panitz in Date 45, Taxpayer 3 asked whether the IRS could collect against a lump sum Workers Compensation settlement; (2) Mr. Panitz could not recall whether Taxpayer 3 told him at that time that he had received a settlement;[26] (3) Attorney 1 did not attach the required Workers Compensation forms to Taxpayer 3 & 4's Offer in Compromise; (4) Mr. Panitz believed Attorney 1 did not ask [Taxpayers 3 and 4] for supporting Workers Compensation documents;[27] (5) Attorney 1 did not attach bank statements to Taxpayer 3 and 4's Form 433-A to support bank account information, as Section 5 required; and (6) in Mr. Panitz' Date 23 response to Officer A's Date 39 request for an updated Form 433A, Mr. Panitz stated: "If we prepare a new form, we will disclose the worker's compensation in exactly the same manner because it was paid as compensation for Taxpayer 3's lost income. To put the settlement anywhere else on the Form 433-AA would not accurately reflect what the settlement actually is, payment for lost income and medical expenses."[28]

I cannot draw the inference Complainant seeks. While Taxpayer 3 and 4's Offer in Compromise did not contain the requisite attachments with regard to Taxpayer 3's Workers Compensation, there is no evidence Mr. Panitz in any way abetted or countenanced Taxpayer 3's misrepresentations in the offer. Rather, the evidence suggests that as soon as the Panitz firm learned of the misrepresentations, Mr. Panitz and Attorney 1 took steps to submit documentation of the true facts. As discussed above, nondisclosure alone cannot prove, by clear and convincing evidence, the knowing communication of false or misleading information that is necessary to establish a willful violation of the provisions of Circular 230.

[26] Specifically, Mr. Panitz testified: I do not recall if he had informed me that he had received a settlement yet. He was merely talking in generalities about whether or not a worker's comp settlement was exempt from IRS levy.
[27] Although Mr. Panitz so testified, there is no evidence as to when he formed that belief.
[28] A more complete rendition of Mr. Panitz' Date 23 response is set forth in the facts section of this decision.

As to Mr. Panitz' Date 23 response to Officer A's Date 39 request for an updated Form 433A, Complainant argues that Mr. Panitz' statements therein are so inconsistent with his testimonial admission of Taxpayer 3 and 4's perjury that they prove Respondent's culpability. I cannot draw that inference, either. While Mr. Panitz' could perhaps have communicated his position regarding Taxpayer 3 and 4's Workers Compensation issue more clearly, a full reading of his Date 23 response cannot justify an inference that he was asserting false information. Mr. Panitz clearly acknowledged that Taxpayer 3 had received a Workers Compensation settlement rather than ongoing periodic payments. The essential thrust of Mr. Panitz' response was that regardless of how the Workers' Compensation monies had been paid to Taxpayer 3, the money represented disability income, which the IRS should not treat as an asset. Mr. Panitz' argument may or may not be legally sound, but his assertion of it is not so unreasonable as to constitute disreputable conduct. Considering all the evidence regarding the Panitz firm's failure to disclose Taxpayer 3's lump sum Workers Compensation settlement in the initial Offer in Compromise, I find the facts herein do not demonstrate Respondent's purposeful disregard and/or indifference to his obligations as an IRS practitioner.

Conclusions of Law

1. The Respondent, Philip G. Panitz, is an attorney eligible to practice before the Internal Revenue Service and is subject to the disciplinary authority of the Secretary of the Treasury and the Director, Office of Professional Responsibility.

2. The Office of Professional Responsibility failed to prove by clear and convincing evidence that Respondent engaged in disreputable conduct within the meaning of 31 C.F.R. 10.51 by willfully submitting or participating in the submission of false and/or misleading information to the Internal Revenue Service in connection with Taxpayer 1 and 2's Date 2 Offer in Compromise.

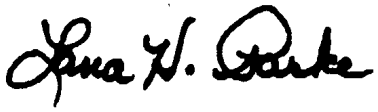
3. The Office of Professional Responsibility failed to prove by clear and convincing evidence that Respondent engaged in disreputable conduct within the meaning of 31 C.F.R. 10.51 by willfully submitting or participating in the submission of false and/or misleading information to the Internal Revenue Service in connection with Taxpayer 3 and 4's Date 25 Offer in Compromise.

Upon the foregoing findings of fact and conclusions of law, and the entire record, pursuant to 31 C.F.R. 10.76, I issue the following:

ORDER[29]

The Complaint is dismissed in its entirety.

Dated at City 1, State 1, June 15, 2009



Lana H. Parke
Administrative Law Judge

[29] Pursuant to 31 C.F.R. 10.77, either party may appeal this decision to the Secretary of the Treasury within thirty (30) days from date of issuance.